In the Supreme Court of the United States

OCTOBER TERM, 1924

FRED N. CROUCH, GUARDIAN OF KATHLEEN Konstovich, plaintiff in error,
v.
THE UNITED STATES
} No. 61

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA

BRIEF FOR THE UNITED STATES

STATEMENT

This is a direct writ of error to the District Court of the United States for the Eastern District of Virginia, transferred to this Court by the Circuit Court of Appeals for the Fourth Circuit, under the provisions of the Act of September 14, 1922. (Section 238 (a) of the Judicial Code.)

Stephen Konstovich, late an enlisted man in the naval service of the United States and attached to and a member of the crew of the U. S. S. *Cyclops*, applied for and received, February 1, 1918, a certificate of war-risk insurance in the sum of $10,000, in which his wife, Kathleen Konstovich, was designated as the beneficiary.

The insurance was payable in monthly installments of $57.50 in the event of the death of the enlisted man during the existence of the contract of insurance, which was governed and controlled and subject to the conditions and limitations of the Act of October 6, 1917, and the subsequent amendments thereof.

The enlisted man lost his life, March 31, 1918, at the time of the destruction of the *Cyclops*, and thereafter the plaintiff as guardian of the widow of Stephen Konstovich made application for and, September 4, 1918, was awarded the insurance, payable in monthly installments of $57.50 from April 1, 1918, and subsequently, October 11, 1918, was awarded compensation in the amount of $25 per month on account of the death or her husband, in addition to the insurance.

Monthly payments of the insurance and compensation awards were regularly continued until July 12, 1921, when the Bureau of War Risk Insurance notified the plaintiff that his ward, Kathleen Konstovich, had by her moral misconduct terminated her right to receive the benefits of either the contract of insurance or compensation, and thereupon discontinued payments under the awards theretofore made.

Thereafter the plaintiff brought suit against the United States in the District Court of the United States to recover both the insurance, provided for by the contract, and the compensation, authorized by the War Risk Insurance Act.

The facts as actually found by the court (R. p. 11) were, among other things:

3. The plaintiff, Kathleen Konstovich, on different occasions during the year 1920 was registered at the York Hotel, Ocean View, Virginia, as the wife of one Samuel Spragg, a man to whom she was not married, and did on such occasions spend the night or nights at the York Hotel and have sexual intercourse with the said Samuel Spragg.

4. The plaintiff, Kathleen Konstovich, did on numerous occasions between August 10th, 1920, and December 3d, 1920, at her own home and in an automobile have sexual intercourse with Samuel S. Spragg.

5. The plaintiff, Kathleen Konstovich, at the time of the termination of her insurance and during the year 1920 at the time of her illicit intercourse with Samuel S. Spragg, bore a bad reputation for chastity and morality, and was suspected of immoral conduct by sundry persons.

On the foregoing facts the court filed two conclusions of law, the first one of which constitutes the sole ground of attack in this court, and reads as follows (R. p. 12):

1. Under the foregoing facts the court finds as a conclusion of law that the said Kathleen Konstovich has violated the provisions of the War Risk Insurance Act by her open and notorious illicit cohabitation, and terminated her right to war risk insurance as of September 17, 1920.

ARGUMENT

I

Apparent lack of jurisdiction on the part of this Court to review the judgment below

The eleventh paragraph of the petition filed by plaintiff in error in the trial court in this suit discloses that it rests upon the authority conferred by Section 405 of the Act of October 6, 1917, 40 Stat. 410, and repeated in Section 1 of the Act of May 20, 1918, 40 Stat. 555, 556, which latter section, so far as pertinent, reads as follows:

> * * * that in the event of disagreement as to a claim under the contract of insurance between the bureau and any beneficiary or beneficiaries thereunder, an action on the claim may be brought against the United States in the district court of the United States in and for the district in which such beneficiaries or any one of them resides * * *.

That it is this statute under which the right of suit and the appellate power of this court over said suit must stand or fall, is further disclosed by the sole error urged in the brief of plaintiff in error (p. 4) filed in this court. It should be stated, however, that the Circuit Court of Appeals to which the case was originally taken, and not plaintiff in error, appears to be responsible for the case being before this court. (R. p. 17.) While it is not so stated in the order of the Circuit Court of Appeals transferring the case to this court, that court, like other lower Federal courts (*Cassarello* v. *United States*, 265 Fed.

326), doubtless entertained the view that the suits authorized by the War Risk Insurance Act were controlled by the procedural provisions of the so-called Tucker Act. Such, however, is not a correct interpretation of the War Risk Insurance Act. The suits there authorized are controlled, after judgment, by the same statutory appeal provisions of the Judicial Code that govern cases generally. This was made plain by this court in *United States* v. *Pfitsch*, 256 U. S. 547, 552. The statute there under consideration was Section 10 of the Lever Act (40 Stat. 276, 279), which provided that certain classes of claimants "shall be entitled to sue the United States * * * and jurisdiction is hereby conferred on the United States District Courts to hear and determine all such controversies." In holding that the jurisdiction thus conferred was to be exercised in accordance with the law governing the usual procedure of a District Court in actions at law for money compensation, and not according to the provisions of the law governing the exceptional jurisdiction concurrent with the Court of Claims, the Court said (p. 552):

> Furthermore, it is significant that this is not the only occasion upon which Congress has provided for suits against the United States exclusively in the District Courts. Section 1 of the War Risk Insurance Act of May 20, 1918, c. 77, 40 Stat. 555, provides that suits upon insurance policies "may be brought against the United States in the district court of the United States in and for

> the district in which such beneficiaries or any one of them resides."

This Court thereupon dismissed the writ of error in that case, indicating that the right of review was in the Circuit Court of Appeals.

While the War Risk Insurance Act was not in issue in that case, this court's reference to it must be treated as advisedly made. The ruling in that case seems to permit no escape from its controlling effect upon the case at bar. The jurisdictional statute in that case is not distinguishable in its purport and scope from the jurisdictional provision of the War Risk Insurance Act here in issue.

While it is true that in the *Cassarello case, supra.*, (265 Fed. 326), the trial court ruled that suits under the War Risk Insurance Act were governed by the procedural provisions of the so-called Tucker Act, it is significant that the case was taken to the Circuit Court of Appeals, and not to this court, for review, and that court dealt with it as an ordinary suit at law for recovery of money. It treated the case as one in which a jury had been waived (279 Fed. 396, 397). Such procedure was also followed in *United States* v. *Law,* 199 Fed. 61, C. C. A., 8th Circuit.

If Congress had intended that these suits should be governed by the procedure prevailing in Tucker Act suits, it could readily have chosen language to express that purpose as it did in the recent World War Veterans' Act of June 7, 1924, C. 320, Sec. 19. The statute as framed carries no inference of such a

purpose, and its language should not be artificially stretched when to do so would result in conferring appellate power upon this court, not otherwise clearly defined.

In view of the foregoing discussion there seems no escape from the conclusion that the case at bar has been erroneously transferred to this court, and should now be retransferred to the Circuit Court of Appeals. Should this court, however, conclude to retain jurisdiction, then it is submitted that the judgment below should be affirmed for the reasons hereinafter set forth.

II

The claimant by her open and notorious illicit cohabitation with a man not her husband terminated her right to receive the insurance as the beneficiary designated by her husband

The provisions of Section 22 of the Act of October 6, 1917 (40 Stat. 401), are again quoted:

> The open and notorious illicit cohabitation of a widow who is a claimant shall operate to terminate her right to compensation or insurance from the commencement of such cohabitation.

The facts in this case (R. p. 11) are that subsequent to the death of her husband and the award of the insurance, the claimant, upon various occasions during the year 1920, accompanied a man to whom she was not married to a hotel where they openly registered as man and wife. In each instance they spent the night together.

The notorious and illicit character of their relations is further evidenced by the fact that on numerous occasions, between August 10, 1920, and December 3, 1920, the claimant and this same man had illicit relations at her own home and elsewhere. Further, at the time of the termination of the payment of the insurance to the claimant by the War Risk Insurance Bureau and during the year 1920, when the relations between the claimant and Samuel S. Spragg were maintained, she "bore a bad reputation for chastity and morality, and was suspected of immoral conduct by sundry persons." (R. p. 11.)

It is urged, however, at page 5 of the brief for the plaintiff in error that "occasional or frequent acts of adultery do not constitute open and notorious illicit cohabitation, as this term has been defined by practically every court of last resort in the United States of America, including the Supreme Court of the United States."

Numerous citations of authority are made in supposed support of this statement.

It will be noted, however, that these authorities are all in connection with prosecutions under statutes which declare cohabitation under certain circumstances to be a criminal offense. The cases merely point out that there may be cohabitation without sexual intercourse and vice versa, and are not in point.

In Re Snow, 120 U. S. 274, and *Hans Neilson, Petitioner*, 131 U. S. 176, for instance, merely determine that cohabitation is a continuing offense and

that but one offense can be predicated upon the living together of the parties.

"Cohabit" contemplates, of course, a dwelling together as man and wife, and "illicit" means something not sanctioned by law, while "open" and "notorious" as these terms are used in the present statute are synonymous and self-explanatory.

These words do not require that the dwelling or living together of the man and woman must be continuous or uninterrupted for any given period of time, as for a year, a month, or a week, but if the relationship is assumed with sufficient frequency, and upon such occasions the couple hold themselves out and represent themselves to be husband and wife, and actually occupy the same bedroom, as in this case, the woman brings herself within the condemnation of the law.

The present statute is not penal and does not work a forfeiture of the insurance or void the contract but merely attaches a condition to the right of the designated beneficiary to receive the benefits of the contract.

The statute is a beneficial one in the interest of the enlisted men of the Army and Navy and their dependents.

The United States, by these contracts, assumed an insurance liability which would have been declined by existing insurance companies; waived all physical examination as a preliminary to entering into the contract, and (40 Stat. 410) assumed "the expenses

of administration and the excess mortality and disability cost resulting from the hazards of war."

Congress, therefore, was fully justified in attaching to the contract a condition that the beneficiary must be included within certain statutory classifications and should not be permitted to receive the benefits of the contract should she lead an immoral life, but that in such event the next person or persons designated in the statutory order should receive and be paid the insurance.

This is the sole effect of the decision of the Bureau of War Risk Insurance in this case. The widow of the sailor, although designated by him as his beneficiary, has by her immoral mode of life subsequent to his death terminated her right to receive this insurance. It must be paid to the next in order according to the statute, as though the insured had died and left no widow and had designated no beneficiary.

It is manifest that in the passage of the legislation it was the purpose of Congress to suppress vice, to promote the general welfare of society, and to protect the public, by preventive legislation, from such notorious social evils as must be guarded against.

This purpose is declared throughout this and similar provisions in like statutes.

Section 29 of the War Risk Insurance Act of June 25, 1918 (40 Stat. 610), for instance, declares that the rights of a soldier or sailor to receive any benefit of insurance under these acts shall be terminated by his discharge from the service for certain desig-

nated reasons, among others, "any offense involving moral turpitude or willful and persistent misconduct."

The fallacy of the contention of the plaintiff in error is readily demonstrable.

Let us consider a case in which the wife of a soldier or sailor might honestly believe that her husband was dead and enter into a marriage contract with another man and should later discover that her legal husband was still living, but with that knowledge should continue to live with the second man as his wife, then according to the argument of the plaintiff in error she would have terminated her right to receive the insurance upon the death of her legal husband, with which the Government agrees.

Upon the other hand, if the wife had resorted to a dissolute life and consorted with men generally and indiscriminately for gain, representing herself as the wife of each man upon each occasion, then her right to receive the insurance upon the death of her soldier or sailor husband would not be affected, and she would still be entitled to receive it. The Government emphatically disagrees with this contention.

The courts will not sustain such an illogical and untenable argument, but will construe the War Risk Insurance Act in the light of the evident intent and purpose of Congress, and will recognize the principle that the object of all law is to preserve the morality of society and suppress vice.

It is evident that the proviso contained in subdivision five of section twenty-two of the War Risk

Insurance Act of October 6, 1917 (40 Stat. 401), was taken from the second section of the General Pension Law of August 7, 1882, with the exception that the word "illicit" as used in the War Risk Insurance Act was substituted for the word "adulterous" as used in the Pension Law.

To illustrate that fact the provisions of the two acts are quoted as follows:

The War Risk Insurance Act declares:

> That marriages, except such as are mentioned in section forty-seven hundred and five of the Revised Statutes, shall be proven in compensation or insurance cases to be legal marriages according to the law of the place where the parties resided at the time of the marriage or at the time when the right to compensation or insurance accrued; and the open and notorious *illicit* cohabitation of a widow who is a claimant shall operate to terminate her right to compensation or insurance from the commencement of such cohabitation.

The Pension Act provides:

> That marriages, except such as are mentioned in section forty-seven hundred and five of the Revised Statutes, shall be proven in pension cases to be legal marriages according to the law of the place where the parties resided at the time of the marriage or at the time when the right to pension accrued; and the open and notorious *adulterous* cohabitation of a widow who is a pensioner shall operate to terminate her pension from the commencement of such cohabitation.

The administrative enforcement of the Pension Laws is confided to the Commissioner of Pensions, and the Act of August 7, 1882, has been many times construed. It must be assumed that in adopting this language in the War Risk Insurance Act, Congress intended that the construction placed thereon by the Commissioner of Pensions should govern and be controlling, and reference is made to his decisions, as follows:

In the case of *Mary E. Boeke*, 1 P. D. 427, it was held that the words "open and notorious adulterous cohabitation," as used in that Act, are descriptive merely of facts which would deprive a widow of her pension and mean that any widow pensioner who is guilty of immoral and licentious acts, of an open and adulterous character, should forfeit her pension.

In the case of *Minerva Beede*, 2 P. D. 119, it is declared that the phrase "adulterous cohabitation" is not necessarily confined to the meaning given to the word in criminal decisions and in criminal jurisprudence, but that it must be regarded as descriptive of immorality and lewdness.

Again in the matter of *Alice Gray*, 7 P. D. 134, it is said that the words are not to be read in their technical sense but according to their popular signification, and apply to a widow who openly and notoriously lives with a man upon terms of illicit intimacy.

The case of *Sarah J. Groome*, 7 P. D. 207, is a leading authority and holds that where a widow openly and notoriously consorts with one or more men under circumstances which would lead the

guarded discretion of a reasonable and just man to infer from such relation, as a necessary conclusion, that it was illicit, comes within the Act of August 7, 1882.

CONCLUSION

It is respectfully submitted that the case should be transferred to the circuit court of appeals for the fourth circuit, on the judgment below affirmed.

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